APPENDIX A

No. 06-1801

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARY LOU SMITH; GREG SMITH, Plaintiffs-Appellants, v. HONORABLE ANDREW N. FRYE, JR., Defendant-Appellee.

488 F.3d 263*; *2007 U.S. App. LEXIS 11632*; *154 Lab. Cas. (CCH) P60,411*; *26 I.E.R. Cas. (BNA) 106

March 12, 2007, Argued
May 18, 2007, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. David A. Faber, Chief District Judge. (2:06-cv-00014-DAF).
Smith v. Frye, 2006 U.S. Dist. LEXIS 39909 (N.D. W. Va., June 14, 2006)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Allan Norman Karlin, Morgantown, West Virginia, for Appellants.

John M. Hedges, BYRNE, HEDGES & LYONS, Morgantown, West Virginia, for Appellee.

ON BRIEF: Teresa J. Lyons, BYRNE, HEDGES & LYONS, Morgantown, West Virginia, for Appellee.

JUDGES: Before NIEMEYER, MOTZ, and DUNCAN, Circuit Judges. Judge Duncan wrote the opinion, in which Judge Niemeyer concurred. Judge Motz wrote a separate opinion concurring in part and concurring in the judgment.

OPINION BY: DUNCAN

OPINION

DUNCAN, Circuit Judge:

Appellants Mary Lou Smith ("Ms. Smith") and her son, Greg Smith ("Mr. Smith"), appeal the district court's dismissal of their suit against Judge Andrew N. Frye, Jr. ("Judge Frye"), Chief Circuit Judge for the Twenty-First Judicial Circuit in West Virginia. Judge Frye discharged Ms. Smith from her at-will employment as a magistrate court clerk after Mr. Smith filed as a candidate for the position of circuit clerk against the incumbent, Ms. Smith's colleague. Appellants brought this action under *42 U.S.C. § 1983*, alleging a violation of their *First Amendment* rights.

Judge Frye moved to dismiss the complaint based upon failure to state a claim and the defense of qualified immunity. Judge Frye further contended that Mr. Smith lacked standing. The district court dismissed the complaint, concluding that Ms. Smith had failed to state a claim because she did not exercise any *First Amendment* rights prior to her discharge and that Mr. Smith's claims failed for want of standing.

We hold that Ms. Smith has failed to state a claim that her firing violated her *First Amendment* speech or associational rights and also hold that Mr. Smith lacks standing. We therefore affirm.

I.

Ms. Smith was hired as the Clerk of the Magistrate Court of Mineral County, West Virginia in November 2002. The Clerk of the Magistrate Court serves at the will and pleasure of the Chief Judge of the Twenty-First Judicial Circuit of West Virginia. Two circuit judges for the Twenty-First Judicial Circuit, Judge Philip B. Jordan, Jr. and Judge Andrew N. Frye, Jr., take turns serving as Chief Judge based on a regular two-year rotation. When Ms. Smith was first hired, Judge Jordan was serving as Chief Judge. On January 1, 2003, Judge Frye assumed the role. From the time of her hiring, Ms. Smith apparently performed her job adequately, receiving no complaints about her performance.

On January 30, 2004, Ms. Smith's adult son, Mr. Smith, filed to run for the office of Mineral County Circuit Clerk. At that time, the office was held by an incumbent Republican whom Mr. Smith would challenge in the Republican primary. Several days later, Judge Frye told Judge Jordan that he intended to fire Ms. Smith because of her son's candidacy. Judge Frye expressed concerns over potential conflicts of interest and the proper functioning of the local judicial system created by the combination of Ms. Smith's employment and her son's candidacy. Judge Frye terminated Ms. Smith's employment on February 5, 2004.

The personnel policies and procedures governing the West Virginia judicial system, as promulgated by the West Virginia Supreme Court of Appeals, grant an employee dismissed without cause a postdismissal hearing to determine if the dismissal was actually due to reasons impermissible under federal or state law. *See* Sections 6.2(E),(G) of the West Virginia Judicial Personnel System Manual (effective Jan. 1990, and as subsequently amended), at J.A. 32-33. In such cases, the Administrative Director of the Supreme Court of

Appeals or his designee appoints a hearing examiner, who in turn takes evidence, makes findings, and submits such findings and recommendations back to the Administrative Director. The Administrative Director must then affirm or reverse the hearing examiner's report. If the Administrative Director finds against the employee, the employee may request an administrative review by the Supreme Court of Appeals, which may grant or deny the request, or uphold or reject the dismissal. Any decision by the Supreme Court of Appeals is final.

In this case, Ms. Smith exhausted the administrative review available to her. The hearing examiner found that Ms. Smith "would not have been discharged had her son not become a candidate for circuit clerk, but that her discharge did not violate state or federal law." *Smith v. Frye, No. 2:06-CV-14, 2006 U.S. Dist. LEXIS 39909, at *4 (N.D. W. Va. June 14, 2006).* The designee of the Administrative Director affirmed the examiner's report, and the Supreme Court of Appeals denied Ms. Smith administrative review.

After exhausting Ms. Smith's administrative review, both she and Mr. Smith filed suit in federal court alleging that Judge Frye violated their *First Amendment* rights. The Smiths allege that Judge Frye fired Ms. Smith because he believed that Ms. Smith supported her son's candidacy, and not that of the incumbent circuit clerk. Although the Smiths' allegations have been both vague and evolving, they do *not* allege that Ms. Smith demonstrated her support through expressive activity or through association. Judge Frye brought a *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss Ms. Smith's claim, and a motion to dismiss Mr. Smith's claim for lack of standing. The district court granted both motions, and we now review the Smiths' appeals from the district court's decisions on each in turn.

II.

We first address Ms. Smith's claims that the district court erred in dismissing her claims under *Rule 12(b)(6)*. We review de novo a district court's dismissal under *Rule 12(b)(6)*, *Mylan Labs, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993)*, and accept all allegations in Ms. Smith's complaint as true, *Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*. Therefore, we assume that Judge Frye fired Ms. Smith because he believed she supported Mr. Smith's candidacy in the race for circuit clerk.

A.

Ms. Smith argues that the district court erred in relying upon cases involving allegedly retaliatory actions taken against public employees based on the content of their speech rather than on cases addressing public employees' associational rights. Indeed, the district court concluded that because Ms. Smith does not allege she said or did anything in support of her son's candidacy (i.e., she does not allege she exercised *First Amendment* rights) that her claim failed as a matter of law. In reaching this result, the district court applied the so-called *McVey* test, our circuit's three-prong test to determine if a retaliatory employment action violates an employee's *First Amendment* rights. *See Ridpath v. Bd. of Governors of Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006)*; *McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998)*.

> First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and efficient services to the public. Third, there must have been a sufficient causal nexus between the

> protected speech and the retaliatory employment action.

Ridpath, 447 F.3d at 316 (internal citations and quotations omitted). Because the first prong of the *McVey* test requires that the "public employee . . . have spoken out as a citizen . . . on a matter of public concern," *id.*, the district court found Ms. Smith's claim failed because she had not spoken or expressed herself in any way. We find no error in the district court's analysis on this issue,[1] but we agree with Ms. Smith that we must also review the claim that her firing violated her *First Amendment* associational rights. We consider that claim below.

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[1] Furthermore, Ms. Smith cannot make a *McVey* claim based on perceived or expected speech. That is, she cannot rest a *First Amendment* retaliation claim on speech Judge Frye perceived she would engage in if not terminated. The second prong of the *McVey* test requires that "the employee's interest in the expression at issue . . . outweigh[] the employer's interest in providing effective and efficient services to the public," *Ridpath, 447 F.3d at 316* (internal quotations omitted). In two recent opinions dealing with the free speech of public employees, the Supreme Court has underscored the government's interest in this balancing test. *See Garcetti v. Ceballos, 126 S. Ct. 1951, 1958, 1960-62, 164 L. Ed. 2d 689 (2006)* ("A government entity has broader discretion to restrict speech when it acts in its role as employer . . . ."); *Waters v. Churchill, 511 U.S. 661, 671-74, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)*. Given the government-as-employer's interests in regulating workplace behavior, including speech in some instances, recognizing a cause of action for employees based on speech not yet spoken would seem an ill-advised disturbance to the balance established in the *McVey* test, especially in an at-will setting.

B.

Ms. Smith argues that her termination violated the *First Amendment* even in the absence of the exercise of *First Amendment* speech rights, relying upon the Supreme Court's decisions in *Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)*, and *Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980)*, and their progeny. She asserts that Judge Frye's dismissing her from her at-will post as magistrate clerk because he believed she supported her son's campaign offends *Elrod*'s prohibition on politically-motivated firings.[2]

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[2] In response to our colleague's concurring opinion, we emphasize again that we accept Ms. Smith's allegations as true. We read them liberally, as well, as indeed we must to analyze them at all; Ms. Smith's arguments have mutated to such an extent on appeal that the current iteration--focusing, it appears, on freedom of association rather than expression--was not addressed by the district court. Other than the Smiths' complaint, none of the filings of either party before the district court are included in the paltry record on appeal. Therefore, it is unclear whether Ms. Smith even raised what now appear to be her associational claims below.

Even interpreted liberally, however, Ms. Smith must show, as a threshold matter, that the act she complains of deprives her of a right, privilege, or immunity secured by the Constitution or laws of the United States. *See 42 U.S.C. § 1983*; *Marshall County Bd. of Ed. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993)*. The issue before us is whether, in claiming she was fired because Judge Frye *believed* she supported her son's candidacy, Ms. Smith alleged a violation of her rights under the *First Amendment*. For the reasons discussed in the body of this opinion, we conclude that she does not. Significantly, Ms. Smith does not allege that action was taken against her because of her conduct, speech or political affiliation. Indeed, she alleges no conduct or speech. Ms. Smith's complaint and the record in this case contain no allegations of what

The *Elrod-Branti* line of cases establishes that a public employee may not, consistent with the *First* and *Fourteenth Amendments*, be terminated for her political affiliation or lack thereof. *Elrod, 427 U.S. at 358-59* (plurality opinion); *Knight v. Vernon, 214 F.3d 544, 548 (4th Cir. 2000)*. "[T]he *First Amendment* forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party of Ill., 497 U.S. 62, 64-65, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990)*. These cases concern the political practice of patronage, or conditioning public employment on party membership or support.

Patronage violates the *First Amendment* because of the "restraint it places on freedoms of belief and association." *Elrod, 427 U.S. at 355* (plurality opinion). Because patronage forces employees to choose either to affiliate with a particular

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Ms. Smith's views or affiliation are or were. Nor does she allege Judge Frye was aware of her beliefs or affiliation when he fired her. We are simply unable to find a constitutional basis for such an attenuated claim, nor can we read any of the *Elrod* line of cases as creating one.

As the concurrence would have it, *post* at 18 n.*, Ms. Smith's complaint asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). On its face, it does *not*. In Ms. Smith's own words, which we accept as true, Judge Frye dismissed her not because of what her views or affiliation *were* but because of, again using Ms. Smith's own word, what he "believed" they might have been. While the concurrence may not view such a claim as attenuated, we do; even the concurrence goes on to acknowledge that Ms. Smith's allegations lie outside the heartland of *Elrod*.

party or risk losing their jobs, it compels speech and belief. *Id. at 356-57.* However, patronage dismissals of individuals in policymaking positions are constitutional, "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id. at 367.* Ms. Smith argues, in effect, that Judge Frye engaged in improper patronage by firing her because her son filed to run for office and because Judge Frye perceived that she supported her son's candidacy.[3]

The facts here, however, present a significant departure from the traditional *Elrod* scenario. In this circuit, *Elrod* cases have fallen into two primary archetypes: (1) cases in which the person being fired is actively associated with a political party or faction (or actively chooses *not* to be so associated) and the individual making the firing decision is a person seeking office, *e.g., Knight v. Vernon, 214 F.3d 544, 545-48 (4th Cir. 2000)*; or (2) cases in which newly elected or appointed officials fire supporters of their rivals during a political transition, *e.g., Sales v. Grant, 158 F.3d 768, 770-74 (4th Cir. 1998)*; *Jenkins v. Medford, 119 F.3d 1156, 1159 (4th Cir. 1997)*; *Cooper v. Lee County Bd. of Supervisors, No. 98-2083, 1999 U.S. App. LEXIS 19705, at *2-9 (4th Cir. Aug. 19, 1999)* (unpublished). Indeed, both *Elrod* and *Branti* presented factual scenarios fitting within

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[3] Neither party offers this court guidance on whether the position of magistrate court clerk, Ms. Smith's former post, is the type of position to which *Elrod*'s protections extend. The record in this case is also devoid of facts that would demonstrate whether Ms. Smith's position is a policymaking position, for which dismissals for reasons of patronage are constitutionally permissible. *See also Branti, 445 U.S. at 518* ("[T]he question is whether . . . party affiliation is an appropriate requirement for the effective performance of the public office involved.")

the latter category. *See Elrod, 427 U.S. at 350-51*; *Branti, 445 U.S. at 509-10*.

A brief review of the facts of some of the cases in the *Elrod* line is useful in analyzing the facts now before us. We first consider a case representing the initial archetypal fact pattern described above. The plaintiff in *Knight v. Vernon*, a former jailer, sued the sheriff who fired her, claiming her termination was an act of patronage in violation of the *First Amendment*. *214 F.3d at 545*. In *Knight*, the firing sheriff was running for reelection and used staff meetings to promote his reelection campaign, urging employees to contribute money, display his signs in their yards, and attend campaign events. *Id. at 547*. The plaintiff did not participate in the sheriff's reelection efforts. When she expressed concern about her job security, the sheriff instructed her to "throw [herself] completely into his campaign." *Id. at 547-48*. After winning the election, the sheriff fired the plaintiff. *Id. at 548*. We reversed the district court's grant of summary judgment in favor of the government employer on the plaintiff's *First Amendment* claim, finding that political allegiance was not an appropriate job requirement for a jailer and that the plaintiff therefore had stated a claim under *Elrod*. *Id. at 545*.

In the sense that the *Knight* plaintiff's firing came *after* the sheriff's successful campaign, *Knight* is also similar to the cases whose facts fit squarely into the second paradigm:[4] those involving the housecleaning that can occur during a political

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[4] Indeed, the lines between the two types of *Elrod* cases are not always bright and distinct. However, in the first type, the official's act seems to be a *punishment* of the fired employee for her affiliation or nonaffiliation, whereas in the second type of case, the punishment of the fired employee is incidental to the firing official's real motivation to *reward* loyal supporters for their affiliation with him.

transition. In *Jenkins v. Medford*, we considered, en banc, the firings of two deputies by a North Carolina sheriff because the deputies failed to support the sheriff in an election. *119 F.3d at 1159*. There, the fired deputies had supported the losing candidate, and when the winner was seated, he replaced them with deputies loyal to him and his campaign. *Id.* Ultimately, we determined that "in North Carolina, the office of deputy sheriff is that of a policymaker" and concluded therefore that North Carolina deputy sheriffs may be lawfully terminated for political reasons as an exception to *Elrod-Branti*. *Id. at 1164*.

One year after deciding *Jenkins*, we again reviewed a case involving postelection termination for political affiliation in *Sales v. Grant*. The plaintiffs in *Sales* were Democrats who had been appointed assistant registrars of Lynchburg, Va. They sued a local appointing body after it caused them not to be reappointed following the election of a new, Republican governor. *158 F.3d at 774*. We held that the plaintiffs were entitled to a trial on their claims. *Id. at 770*.

An assessment of decisions of our sister circuits interpreting *Elrod* reveals the same fact patterns described above. *See, e.g., Allen v. Martin, 460 F.3d 939, 940 (7th Cir. 2006)* (affirming summary judgment in favor of government officials when the plaintiff was terminated during a regime change from a position for which political affiliation was an appropriate criterion); *Borges Colon v. Roman-Abreu, 438 F.3d 1, 6 (1st Cir. 2006)* (affirming award of damages to city sanitation employees dismissed by a newly elected mayor because they shared the political affiliation of the ousted mayor); *Gentry v. Lowndes County, 337 F.3d 481, 483-85 (5th Cir. 2003)* (granting qualified immunity to newly elected county officials who terminated plaintiffs' jobs as road manager and county administrator); *Aucoin v. Haney, 306 F.3d 268, 270-71 (5th Cir. 2002)* (granting qualified immunity to an interim district attorney running for office who fired an assistant district

attorney who openly supported opponent). Although these cases vary in their decisions on the merits, the facts fall consistently into one of the two patterns we have described.

By contrast, recognizing Ms. Smith's claim would lead us far afield.[5] In each of the above-cited cases, even those in which the plaintiff's claim ultimately failed, there is a clear and direct connection among the supervisor's own political association, that of the terminated employee, and the adverse employment action.

The Supreme Court has held that "the test of 'clearly established law'" is not to be applied at a level of broad "generality" but rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).* "[I]n the light of preexisting law the unlawfulness [of the official's actions] must be apparent." *Id. at 640.* Ms. Smith admits that she cannot "identif[y] a case under *42 U.S.C. § 1983* directly on point," Appellants' Br. at 14, and neither can we. Given this, and our discussion of the cases applying *Elrod*, any unlawfulness of Judge Frye's actions here in firing Ms. Smith could only have been "[un]apparent," *Anderson, 483 U.S. at 640*, and therefore not likely to be "known [by] . . . a reasonable person," *Harlow, 457 U.S. at 818.*

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[5] For this reason we are satisfied that, even if we were to find that Ms. Smith had alleged the violation of a constitutional right, Judge Frye would nonetheless be entitled to qualified immunity in this case. Under the doctrine of qualified immunity, government officials are generally immune "from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); see also Johnson v. Caudill, 475 F.3d 645, 650 (4th Cir. 2007).*

There is no such connection here. Smith alleges no affiliation with her son's candidacy, unlike the fired deputies in *Jenkins* who supported the losing candidate in the sheriff's race. *See 119 F.3d at 1159*. In fact, she alleges no affiliation with any political party or faction, making her unlike even the assistant registrars in *Sales* who were not reappointed based on their party affiliation with opponents of the newly empowered party. *See 158 F.3d at 774*. Judge Frye was not himself seeking office and terminating those who did not support his candidacy, as was allegedly done by the supervising sheriff in *Knight*. *See 214 F.3d at 545*. Nor was Judge Frye cleaning house after an electoral victory, as in the fact patterns of *Elrod*, *Branti*, *Jenkins*, and *Sales*. *See Elrod, 427 U.S. at 350-51*; *Branti, 445 U.S. at 509-10*; *Jenkins, 119 F.3d at 1159*; *Sales, 158 F.3d at 774*. Finally, unlike *all* of the cited Fourth Circuit cases, Ms. Smith was terminated at the time the field for the Republican primary was set and included her son and the incumbent circuit clerk and not after an election as in the typical *Elrod* scenario. The application of *Elrod*'s rationale--protecting public employees for whom political affiliation is not a legitimate job qualification from coercion with respect to their political beliefs--is far less compelling on these facts. Given the decisionmaker's detachment from the political process at play, any conclusion that Judge Frye's decision was intended to punish Ms. Smith for expressive conduct or political affiliation or to compel her conduct or affiliation requires an additional inferential leap which we are unwilling to make.

Indeed, the very differences between the circumstances here and those in the cases within the usual *Elrod* fact patterns suggest that Judge Frye had constitutionally valid reasons for dismissing Ms. Smith. Although we of course accept as true at this stage of the litigation Ms. Smith's allegation that she was fired because Judge Frye believed that she supported her son's candidacy rather than that of the incumbent circuit clerk, such

an allegation does not necessarily, by itself, state a *First Amendment* claim under *Elrod*. Rather, Judge Frye's belief that Ms. Smith supported her son's candidacy might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system. It is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee.

Extending *Elrod* to Ms. Smith's claim would require courts to undertake subjective factfinding inquiries into government officials' actual motivations in making at-will employment decisions to a greater extent than and in contexts in which this court has never ventured. Such an exercise, on these attenuated facts, would topple the *Elrod-Branti* balance of "*[F]irst [A]mendment* rights of the [public employees] and the need for efficient and effective delivery of public services." *Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989)*. As the Supreme Court has cautioned, "if an employee's private political beliefs would interfere with the discharge of his public duties, his *First Amendment* rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti, 445 U.S. at 517.*

We are disinclined to disturb that balance on these facts. Judge Frye dismissed Ms. Smith from her at-will employment as magistrate court clerk, a position to which it is unclear *Elrod*'s protections apply,[6] neither in the heat of his own

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[6] The uncertainty regarding whether Ms. Smith's position was of the type entitled to *Elrod*'s protections provides another reason that, even if Ms. Smith could state a claim under *Elrod*, Judge Frye would be entitled to qualified immunity. It is not "clearly

campaign nor during a victory housecleaning. We do not find that Ms. Smith alleges a constitutional violation here, and therefore affirm the district court's dismissal of her claims.

III.

We now turn to Mr. Smith's argument that the district court improperly dismissed the complaint as to him for lack of standing. "A district court's dismissal for lack of standing, and therefore lack of jurisdiction, is a legal ruling that we review de novo." *White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).*

It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a "case or controversy" exists "between himself and the defendant" and "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).* Standing has three elements:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to

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established" that Ms. Smith's position is a protected one, rather than one for which political affiliation is a legitimate job requirement. *See Jenkins, 119 F.3d at 1162 n.37.*

> merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotations omitted).

The threshold issue in this case is whether Mr. Smith suffered an injury in fact for purposes of Article III standing. Mr. Smith alleges such an injury on two grounds. First, he argues that his *First Amendment* rights as a candidate for public office were chilled by Judge Frye's allegedly retaliatory firing of Mr. Smith's mother. Additionally, Mr. Smith avers that he suffered the injuries of indignity, embarrassment, and emotional distress because he felt responsible for his mother's discharge. Judge Frye responds that any legally cognizable injury flowing from Ms. Smith's dismissal is an injury to *her* for which Mr. Smith lacks standing. We address each of Mr. Smith's arguments in turn and conclude that he does not have standing to assert the instant claims.

A.

In support of his position that his *First Amendment* rights were chilled by Judge Frye's discharge of his mother, Mr. Smith relies upon our decision in *Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005)*, in which a law student published letters in the school's newspaper criticizing a professor and his grading process after she had been unable to complete an exam because of a migraine headache. After publishing the letters, the student received a failing grade. Later, the student was permitted to retake the exam but was only provided three days' notice. We held that to demonstrate injury in fact, it was sufficient for the plaintiff in that case to show that her *First Amendment* activities had been chilled and that she need not show she ceased those activities altogether in order to state a cause of action. *Id. at 500.* A chill

results "if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of *First Amendment* rights." *Id.* Accordingly, Mr. Smith argues that even though his candidacy went on unaffected after his mother's firing, "a person of ordinary firmness" would have been deterred from exercising his *First Amendment* rights.

However, *Constantine* is fundamentally distinguishable from this case. In *Constantine*, the plaintiff's *First Amendment* rights were chilled by direct retaliatory action against her, whereas in the instant case, the alleged retaliatory action was taken not against Mr. Smith at all, but rather against a third party, his mother. Mr. Smith cites to no authority that supports his contention that further speech of a person who exercised *First Amendment* rights (here, Mr. Smith in filing his candidacy) might be chilled by an allegedly retaliatory action (here, the firing of Ms. Smith) exacted upon a different person.[7] Quite simply, under the circumstances of this case, an adverse employment action against Ms. Smith does not create a

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[7] In fact, at least one Supreme Court decision casts doubt on whether such an indirect chill could ever give rise to a cause of action. *See Laird v. Tatum, 408 U.S. 1, 10-11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).* In *Laird*, the Court held that when the government engages in "regulatory, proscriptive, or compulsory" action, a plaintiff's speech rights are chilled only if he is "either presently or prospectively subject" to the challenged exercise of government power. *Id.* (citations omitted). Here, Mr. Smith is a bystander to an allegedly unlawful government action (his mother's firing), but he himself is not "presently or prospectively subject" to the challenged action. *See id. Cf. Younger v. Harris, 401 U.S. 37, 41-42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* (holding that plaintiffs who had not been indicted in a state proceeding had no "controversy" with the state where they alleged simply that a law's existence, and the state prosecution of a third party under such law, made them feel inhibited in their political advocacy activities).

concrete and particularized violation of any legally protected right of Mr. Smith's. *See Lujan, 504 U.S. at 560.*[8]

B.

With respect to Mr. Smith's argument that he suffered injury in the form of emotional distress after Judge Frye terminated his mother, the district court applied the venerable common-law tort principle that "one cannot collect for emotional damage or humiliation occasioned by harm done to a family member absent fairly particular circumstances,"[9] and noted that claims under *§ 1983*, like Mr. Smith's, are "at [their] root[s,] . . . tort[s]." *Smith v. Frye, 2006 U.S. Dist. LEXIS 39909, at *12.* Mr. Smith now contends that the district court's reliance on tort principles was misplaced.

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[8] No matter how disappointing his mother's termination was for him, Mr. Smith's candidacy for public office cannot immunize his mother from the downside of at-will employment. That is, Ms. Smith's firing for legally permissible reasons, or for no reasons at all, gives rise to no claim that *Mr. Smith's First Amendment* rights were being chilled. Any claim that Ms. Smith was fired for unlawful reasons can be brought by her, the directly injured party, as evidenced by this lawsuit. *See Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)* (noting that the directly-injured parties "themselves usually will be the best proponents of their own rights"); *Warth, 422 U.S. at 499.*

[9] For example, under West Virginia law, a third-party plaintiff may recover for intentional infliction of emotional distress if a defendant's "extreme and outrageous" conduct, directed at a member of the plaintiff's immediate family while he was physically present, caused the plaintiff "severe emotional distress." *See, e.g., Courtney v. Courtney, 186 W. Va. 597, 413 S.E.2d 418, 422 (W. Va. 1991).* Obviously, Mr. Smith could not prove these elements on a state-law tort claim.

We, however, find the district court's reference to tort-law principles entirely appropriate in this instance. *See Smith v. Wade, 461 U.S. 30, 34, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)* (noting that *§ 1983* "was intended to create a species of tort liability" and that the Supreme Court "look[s] . . . to the common law of torts . . . to carry out the purpose and policy of the statute" (internal quotations omitted)). We agree with the district court that "[a]llowing an adult son to collect for emotional damages and humiliation resulting from his mother's discharge from her employment casts the net of possible liability too broadly," *Smith v. Frye, 2006 U.S. Dist. LEXIS 39909, at *14*, and therefore, that such emotional distress is insufficient as an Article III injury in fact. Because we reject as insufficient both of the injuries Mr. Smith alleges, we affirm the district court's ruling that he lacked standing to bring the instant suit and its dismissal thereof as to Mr. Smith.

IV.

Having concluded that Ms. Smith has failed to state a claim that Judge Frye violated her *First Amendment* rights and that Mr. Smith lacks standing to assert claims against Judge Frye based on his mother's termination, we affirm the district court's dismissal of the Smiths' complaint.

AFFIRMED

CONCUR BY: DIANA GRIBBON MOTZ

CONCUR

DIANA GRIBBON MOTZ, Circuit Judge, concurring in part and concurring in the judgment:

I join the majority opinion except for its determination that Mary Lou Smith has failed to allege a cause of action for violation of her *First Amendment* rights. I believe that in her

complaint Ms. Smith has indeed alleged facts sufficient to state a claim against Andrew N. Frye. But because applicability of the *First Amendment* to facts like those alleged was not clearly established at the time of the challenged discharge, qualified immunity protects Judge Frye from liability. Accordingly, I concur in the judgment.

I.

A.

"[T]he purpose of a *Rule 12(b)(6)* motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. A 12(b)(6) motion "'does not resolve contests surrounding the facts [or] the merits of a claim.'" *Id.* (*quoting Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*). Accordingly, an appellate court "may only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-50, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)* (*quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*). Moreover, when a complaint alleges a civil rights violation, "we must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory*" that could be proved consistent with the allegations. *Edwards, 178 F.3d at 244* (overturning dismissal of suspended government employee's *First Amendment* claims). With these principles in mind, I turn to the allegations of Ms. Smith's complaint, which we must take as true at this juncture.

Beginning in November 2002, Ms. Smith served as the clerk of the Magistrate Court of Mineral County, West Virginia, under the supervision of Judge Frye, Chief Judge of the 21st Judicial Circuit of West Virginia. Ms. Smith has an adult son,

Greg Smith. On January 30, 2004, Greg filed to run for circuit clerk of Mineral County; he would oppose the incumbent clerk in the Republican primary. Less than a week later, Judge Frye fired Ms. Smith. Judge Frye told another judge that "he wanted to fire Ms. Smith because her son had filed to run for circuit clerk" and he was "angry at" her for this reason. Prior to this time "no complaints had been made by anyone about Ms. Smith's performance as the Magistrate Clerk; to the contrary she was widely respected by everyone with whom she worked." Ms. Smith's complaint alleges that Judge Frye discharged her "because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and *because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk.*" (emphasis added).

The question is whether these allegations, viewed in the light most favorable to Ms. Smith, state a *First Amendment* claim. I believe they do.

B.

"[P]olitical belief and association constitute the core of those activities protected by the *First Amendment.*" *Elrod v. Burns, 427 U.S. 347, 356, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)* (plurality). For that reason, the Supreme Court has held that "the *First Amendment* prohibits the dismissal of a public employee solely because of [her] private political beliefs." *Branti v. Finkel, 445 U.S. 507, 516-17, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).* The *First Amendment* also "prohibits the firing of public employees solely for the reason that they [are] not affiliated with a particular political party *or* candidate." *Knight v. Vernon, 214 F.3d 544, 548 (4th Cir. 2000)* (emphasis added) (internal quotation marks omitted). The only exception to the *Elrod-Branti* bar on politically motivated personnel decisions occurs when an employer "can demonstrate that party affiliation [or political allegiance] is an appropriate requirement

for the effective performance of the public office involved." *Branti, 445 U.S. at 518*. Thus a public employer may discharge an employee because of her political beliefs or allegiance only if the employer "can demonstrate" that this is an "appropriate requirement" for the employee's "public office." *Knight, 214 F.3d at 549* (citing *Branti, 445 U.S. at 518*) (internal quotation marks omitted).

In this case, Ms. Smith has alleged that Judge Frye fired her "because [he] believed that [she] supported her son, not the incumbent circuit clerk" in the upcoming Republican primary.*

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* Although the majority insists that it reads Ms. Smith's complaint "liberally," *ante* at 6 n.2, it clearly fails to do so. Thus the majority contends that the complaint fails because it does not allege "what Ms. Smith's views or affiliation are or were." *Id.* In fact, as noted above, the complaint alleges that Judge Frye discharged Ms. Smith "because [he] believed that [she] supported her son, not the incumbent circuit clerk." Read in the light most favorable to Ms. Smith, that allegation asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). The majority also faults the complaint for its failure to allege that "Judge Frye was aware of [Ms. Smith's] beliefs or affiliation." *Id.* But surely Ms. Smith's allegation that Judge Frye fired her *because* of what he "believed" her views and affiliation to be suffices. Judge Frye may have been wrong about Ms. Smith's beliefs or affiliation; but if he fired her for an unconstitutional reason she would still have a cause of action. "[A]lleged discrimination is no less malevolent because it was based on an erroneous assumption." *Estate of Amos ex rel. Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001)* (allowing claim that city discriminated against deceased because it believed he was Native American, even though he was actually white). And even if Ms. Smith had to demonstrate that she actually did support her son, surely that fact "could be prove[n] consistent with the allegations" in the complaint. *Hishon, 467 U.S. at 73*. When read in the best light for Ms. Smith, her complaint alleges that Judge Frye used the power of the state to punish Ms. Smith for her political

Certainly, Ms. Smith could prove a "set of facts . . . consistent with [this] allegation[]" that would entitle her to relief for a violation of her *First Amendment* rights. *Hishon, 467 U.S. at 73.* For example, Ms. Smith could prove that Judge Frye dismissed her "because of [her] private political beliefs," i.e., her support for a particular political candidate -- her son. *See Branti, 445 U.S. at 517.* Or, she could prove that Judge Frye discharged her solely because she was not "affiliated with" a particular candidate, i.e., her son's opponent--the incumbent circuit clerk. *See id.* In these situations, each consistent with the complaint, Judge Frye's dismissal of Ms. Smith would be "substantially motivated by political considerations," *Sales v. Grant, 158 F.3d 768, 779 (4th Cir. 1998)*, not justified by any "appropriate" job requirement, and so contrary to the *First Amendment.*

Of course, discovery might produce evidence that Judge Frye discharged Ms. Smith, as the majority posits, *ante* at 3, 10-11, to avoid disruption to the judicial system. Although Ms. Smith's complaint states that the circuit clerk "does not have any supervisory or other direct employment relationship with the Magistrate Clerk," discovery may reveal that the proper functioning of the judicial system required Ms. Smith and the incumbent circuit clerk to work closely together. If the evidence demonstrates that Judge Frye feared that Greg Smith's candidacy would disrupt that relationship, he may well have violated no constitutional provision in discharging Ms. Smith. However, no evidence yet supports this conclusion.

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affiliation and/or views. Rather than being "attenuated," *id.*, this claim sounds in the heart of the *First Amendment. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)* ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . . .").

Similarly, although some clerks have purely ministerial and administrative duties, others make policy or enjoy a confidential relationship to their superiors, and as the majority acknowledges, *ante* at 7 n.3, nothing in the record to date informs us as to which category Ms. Smith's position belonged. If Ms. Smith's duties were of the ministerial sort, her political beliefs and affiliations were plainly irrelevant to "effective performance" of her job. On the other hand, if discovery were to produce evidence indicating that Ms. Smith made policy, those beliefs might well be an "appropriate" job requirement.

But at this juncture there has been *no* discovery and so we have *no* basis for holding that her discharge can be justified. Rather, we must read the allegations in the complaint in the light most favorable to Ms. Smith; if that is done, she undoubtedly has alleged a cause of action under the *First Amendment*.

II.

I agree with the majority, however, that Ms. Smith has not alleged a violation of clearly established law. Our determination of whether law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*. "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)*. "[T]he focus is on whether the [official] had fair notice that [his] conduct was unlawful." *Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)*.

The most apposite Supreme Court cases, *Elrod* and *Branti*, address traditional political patronage practices quite unlike Ms. Smith's allegations. And as the majority persuasively explains, our court and others have usually applied the *First Amendment*

principles articulated in *Elrod* and *Branti* to patronage situations. *See ante* 7-9. Of course, there need not be a case directly on point for the law to be clearly established for qualified immunity purposes. *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*; *Buonocore v. Harris, 65 F.3d 347, 356-57 (4th Cir. 1995)*. But Ms. Smith has not cited, and we have not found, a single case in which any court, prior to February 2004 (the date of Ms. Smith's discharge), had recognized a claim similar to hers. That is, no court had allowed a claim that a discharge violated the *First Amendment not* because the employer was clearing positions for his own supporters or punishing an employee for her political activity, but because the employer was "angry" at the employee due to her relative's candidacy and, absent any conduct on her part, because he "believed" that she supported her relative, "not the incumbent circuit clerk."

This may be an unfair reason for firing Ms. Smith but, because she was an at-will employee, Judge Frye could fire her for no reason or any reason at all--except an unlawful reason. I believe that she has alleged facts sufficient to make out a claim that the firing was unlawful; but given the dearth of authority to that effect, I cannot conclude that Judge Frye was on "fair notice" of this. As such, Judge Frye is entitled to qualified immunity.

For this reason, I agree with the majority that we must uphold the dismissal of the complaint.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 15, 2007

No. 06-1801
2:06-cv-00014-DAF

MARY LOU SMITH; GREG SMITH
Plaintiffs - Appellants

v.

HONORABLE ANDREW N. FRYE, JR.
Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to t his Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Motz, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARY LOU SMITH, et al., Plaintiffs, v. HONORABLE ANDREW N. FRYE, JR., Defendant.

CIVIL ACTION NO. 2:06-0014

2006 U.S. Dist. LEXIS 39909

June 14, 2006, Decided

SUBSEQUENT HISTORY: Affirmed by *Smith v. Frye, 2007 U.S. App. LEXIS 11632 (4th Cir. W. Va., May 18, 2007)*

COUNSEL: For Mary Lou Smith, Greg Smith, Plaintiffs: Allan N. Karlin, Sophie E. Zdatny, Allan N. Karlin & Associates, Morgantown, WV.

For Honorable Andrew N. Frye, Jr., Defendant: John M. Hedges, Byrne & Hedges, Morgantown, WV.

JUDGES: David A. Faber, United States District Judge.

OPINION BY: David A. Faber

OPINION

MEMORANDUM OPINION

Pending before the court is defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 7).[1] Plaintiffs filed a response to defendant's motion, and this motion is now ripe for adjudication. Having reviewed the record and applicable case law, by accompanying Judgment Order, defendant's motion to dismiss (Doc. No. 7) is hereby granted. The Clerk is directed to strike this case from the active docket of the court.

A. Factual Background

In November 2002, plaintiff Mary Lou Smith was hired as the Clerk of the Magistrate Court of Mineral County, West Virginia. (*See* Doc. No. 1 ¶7.) In that position, Mary Lou Smith was under defendant's supervision in his capacity as the Chief Judge of the 21st Judicial Circuit of West Virginia. (*See id.* ¶8.) Mary Lou Smith avers that, as of January 2004, defendant had never told her, or anyone else, that he had concerns about her work, and that no complaints about her performance had been made by anyone. (*See id.* ¶¶14-15.)

On January 30, 2004, plaintiff Greg Smith filed to run for the position of Circuit Clerk in the upcoming Republican Party primary against the incumbent Circuit Clerk of Mineral County. (*See id.* ¶10.) Greg Smith is Mary Lou Smith's oldest son and was thirty years old as of that time. (*Id.*) Plaintiffs aver that, after Greg Smith filed candidacy papers, defendant told another judge that he wanted to fire Mary Lou Smith because her son

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[1] Also pending before the court is plaintiffs' motion for leave to file a surreply. (*See* Doc. No. 11.) For reasons appearing to the court, plaintiffs' motion for leave to file a surreply (Doc. No. 11) is granted, and the court will consider plaintiffs' surreply in evaluating defendant's motion to dismiss.

had filed for the office of circuit clerk. (*Id.* ¶12.) Moreover, according to this other judge, defendant was angry at Mary Lou Smith because of her son's candidacy. (*Id.* ¶13.)

Defendant terminated Mary Lou Smith as of February 5, 2004. (*See id.* ¶¶16-17.) Plaintiffs contend that Mary Lou Smith was fired because defendant believed that Mary Lou Smith would support her son, and not the incumbent circuit clerk in the upcoming election. (*Id.* ¶18.)

Following her termination, Smith requested a hearing under the personnel policies of the West Virginia Supreme Court of Appeals. (*Id.* ¶19.) Plaintiffs indicate that the hearing is provided by the Supreme Court in the court's capacity as an employer, and that the hearings are not judicial proceedings. (*Id.* ¶21.) At this hearing, defendant insisted that he had no reason whatsoever for firing Mary Lou Smith. (*Id.* ¶26.) Defendant's statements were opposed by those of the other judge who testified that defendant had said that he was going to fire Mary Lou Smith because her son had filed for the primary election against the incumbent circuit clerk. (*Id.* ¶24.) Defendant responded to the other judge's testimony with only the assertion that he did not recall any such conversation. (*Id.* ¶25.)

The hearing officer concluded that Mary Lou Smith would not have been discharged had her son not become a candidate for circuit clerk, but that her discharge did not violate state or federal law. (*See id.* ¶29.) Mary Lou Smith disagreed with this conclusion following the hearing, and continued to disagree with it at the time the Complaint was filed. (*Id.* ¶30.) Following several further levels of administrative review, Mary Lou Smith's discharge was upheld by the Supreme Court of West Virginia. (*See id.* ¶¶38-39.)

In his motion to dismiss, defendant contends that plaintiff Greg Smith's claims against him should be denied because

either Greg Smith suffered no "injury in fact" or because his injuries are de minimis.[2] (*See* Doc. No. 7 at 15-19.) Defendant contends that plaintiff Mary Lou Smith's claims are barred by the doctrine of qualified immunity, that her claims fail to state a claim for wrongful discharge or retaliation based upon the violation of a substantial public policy, and that her claims are barred under principles of claim preclusion as they were already addressed by the West Virginia Supreme Court of Appeals. (*Id.* at 9-15, 19-21.) The court later examines defendant's arguments in turn.

B. Standard of Review

Defendant has moved for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To succeed on a motion to dismiss under Rule 12(b)(6), defendants must demonstrate that plaintiffs' claims are "so insubstantial, implausible, foreclosed by prior decisions of the [Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Dismissal is appropriate where plaintiffs can prove no set of facts that would support their claims. *Flood v. New Hanover County,* 125 F.3d 249, 252 (4th Cir. 1987).

A Rule 12(b)(6) motion tests the sufficiency of the pleading. It does not resolve factual disputes, "the merits of a

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[2] Defendant also contended that, insofar as plaintiffs asserted claims against him in his official capacity, any such claims were barred by the Eleventh Amendment to the United States Constitution. (*See* Doc. No. 7 at 4-5.) In their response, plaintiffs indicated that their claims were against defendant in his individual capacity. (*See* Doc. No. 9-1 at 8.) As such, the portion of defendant's motion to dismiss discussing Eleventh Amendment immunity and official capacity must be denied as moot.

claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992) (citations omitted). In considering the motion, the claims must be viewed in the light most favorable to the non-moving party and all allegations in the complaint accepted as true. *Id.* Dismissal is appropriate only when it appears beyond a doubt that no set of facts would entitle the pleader to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

C. Analysis

1. Defendant's Motion to Dismiss regarding Greg Smith

a. Claims under 42 U.S.C. § 1983

Under Article III of the United States Constitution, it is a well-settled principle that "a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). It is incumbent upon every plaintiff to establish standing to prosecute a civil action. *Elk Grove School Dist. v. Newdow,* 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Warth,* 422 U.S. at 498. Particularly, the elements of standing include three elements:

> First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of - the injury has to be 'fairly traceable to the challenged action of the defendant, and not . . . the result [of] some third

> party not before the court." Third, a plaintiff must show the "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

McConnell v. FEC, 540 U.S. 93, 225-26, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

It is clear that plaintiff Greg Smith does not have standing to contest damages resulting from the major issue present in this case, that is, his mother's dismissal from her job as a magistrate clerk in Mineral County, West Virginia. He cannot sue to get her job back; she has to do this herself.

In his motion to dismiss, defendant avers as much; he contends that Greg Smith has either suffered no actual injury, or that the injuries he suffered were de minimis.[3] (Doc. No. 7 at 9-15.) Defendant contends that Greg Smith cannot allege that his candidacy was affected in any concrete way by the termination of his mother's employment, and that a "speculative and subjective claim of 'chilling' of his [political] rights" is insufficient to confer standing upon Greg Smith. (*Id.* at 16.) In response, Greg Smith avers that he has standing to assert the claims raised in the Complaint because "a person of ordinary firmness would be chilled from exercising his rights, where, as here, the state employment of his close relative was terminated because he filed to run for political office." (*See* Doc. No. 9 at 15) (discussing *Constantine v. Rectors & Visitors of George*

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[3] As defendant notes, "a trivial or de minimis injury will not support a retaliatory prosecution claim." *Poole v. Otero*, 271 F.3d 955, 960 (10th Cir. 2001), overruled in part by *Hartman v. Moore*, 126 S. Ct. 1695, 1701, 164 L. Ed. 2d 441 (2006). However, a review of the entirety of the Poole decision leads to the conclusion that, insofar as the general contours of retaliation are concerned, any injury that causes "chilling" is not de minimis.

Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005)). Under Fourth Circuit precedent, "for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500 (listing cases from other circuits). In *Constantine*, the Fourth Circuit noted that the "ordinary firmness" standard is objective.

> We have never held that a plaintiff must prove that the allegedly retaliatory conduct caused her to cease First Amendment activity altogether. The cause of action targets conduct that tends to *chill* such activity, not just conduct that *freezes* it completely. Moreover, such a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending on the plaintiff's will to fight. We believe that an objective standard better instructs public officials as to the obligations under the First Amendment.

Id.

Plaintiffs argue that West Virginia recognizes that the right to run for public office is a valuable and fundamental right, and that retaliatory actions of the sort defendant is alleged to have taken, would "certainly chill a person of ordinary firmness from exercising his right to file for public office." (*See* Doc. No. 9 at 17.) Greg Smith contends that he does not have to show actual effects of defendant's allegedly unconstitutional conduct, (*Id.*) Alternatively, Greg Smith contends that compensatory damages in a retaliation claim under § 1983 may include embarrassment, humiliation, and emotional distress, and that he suffered such damages, and that these damages fulfill the "injury in fact" requirement. (*See id.* at 18) (citing *Bloch v. Ribar*, 156 F.3d

673, 679 (6th Cir. 1998) (collecting authorities on the issue of compensable issues in § 1983 retaliation cases)). As such, defendant's motion to dismiss based on Greg Smith's standing and ostensibly de minimis injuries must be denied.

In response, defendant contends that Greg Smith must show a concrete or particularized injury to his own personal legal rights before his claims are allowed to proceed. (*See* Doc. No. 10 at 10.) Assuming the truth of the allegations in the Complaint, defendant argues, only Mary Lou Smith was injured in a legal sense by defendant's actions. (*Id.*) Defendant's right to be a candidate for public office was not adversely affected in any way. (*Id.*) On this basis, defendant distinguishes this case from Constantine where a plaintiff who publicly criticized a law school professor's grade appeal policies was also the same person who had to retake an exam. (*Id.*) Defendant also distinguishes *Bloch v. Ribar* based on facts. (*Id.*) In *Bloch*, a sheriff "publicly revealed the extremely humiliating details of a rape after the victim publicly criticized him for failing to conduct an appropriate investigation." (*Id.*)

The court accepts defendant's arguments regarding Greg Smith nearly in their entirety. Greg Smith cannot have standing based solely on the assertion that his political rights were ostensibly "chilled." Similarly, he has not alleged an injury in fact for a actual injury that was, in reality, inflicted entirely upon his mother. She lost her job; his candidacy continued. For Greg Smith to have standing, he would have to be injured in a some way recognized by the law that is independent of his mother's injury. Here, Greg Smith contends that he was injured because his mother's discharge caused him to suffer indignity, embarrassment, humiliation, and emotional distress. Common law principles bar such claims as he has alleged here from succeeding.

It is an age-old principle in tort law that one cannot collect for emotional damage or humiliation occasioned by harm done

to a family member absent fairly particular circumstances.[4] Although Greg Smith's claim has a constitutional basis, it is at its root a tort. The Restatement (Second) of Torts § 46, comment (1), notes that it is important to limit the scope of persons who can recover damages for emotional distress caused by intentional actions. Specifically, the Restatement notes that the trend in decided cases is that liability for intentional infliction of emotional distress

> is limited . . . to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation maybe justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years

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[4] Under West Virginia law, a third party may recover for intentional infliction of emotional distress damages if:

> (1) defendant's conduct was extreme and outrageous; (2) such conduct was directed at the third party; (3) the plaintiff is a member of the third party's immediate family; (4) the plaintiff was physically present when the extreme and outrageous conduct took place; (5) the plaintiff suffered severe emotional distress as a result of the conduct.

See, e.g., Courtney v. Courtney, 186 W. Va. 597, 601, 413 S.E.2d 418, 422 (1991). Although it is clear that this is not determinative for plaintiff's cause of action here, it is illustrative of the fact that emotional damages resulting from tortious conduct are difficult to receive.

> afterward may lack the guarantee of genuineness which her presence on the spot would afford.

Id.

The court can see no reason why this general principle in tort law is inapplicable in this case. Allowing an adult son to collect for emotional damages and humiliation resulting from his mother's discharge from her employment casts the net of possible liability too broadly. A party can only collect damages for their own discharge, and not for the discharge of a family member or ostensible political supporter. If one were to follow Greg Smith's argument to its logical conclusion, someone would be able to collect on a tort inflicted on his family member. This cannot happen. The court finds that plaintiff Greg Smith's allegations that he suffered indignity, embarrassment, humiliation, and emotional distress as a result of his mother's unlawful termination are not a sufficient "injury in fact" under Article III of the United States Constitution.

Bloch v. Ribar, 156 F.3d 673, 679 (6th Cir. 1998), upon which plaintiff relies to show that he has suffered an "injury in fact," is distinguishable on its facts from this case. In *Bloch*, the plaintiff sued for emotional damages and humiliation that occurred to her. *See* 156 F.3d at 676. Although *Bloch* collects cases and has been cited approvingly by the Fourth Circuit, nothing in it stands for the proposition that a party can claim damages based on emotional damage or humiliation that has occurred resulting from harms occurring to a family member. *See Jennings v. Univ. of N.C.*, 444 F.3d 255, (4th Cir. 2006) (citing *Bloch* for the proposition that being forced to reveal information regarding sexual conduct may implicate a person's interest in avoiding the disclosure of personal matters); *Constantine v. Records & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (same). Similarly, no decision of which the court is aware has awarded damages for emotional

harm or humiliation to the family member of a person who was unconstitutionally discharged. The principle distinguishing this case from every other case this court has reviewed is Greg Smith's position as a third party.

The combination of Smith's status as son and political candidate, although exceedingly troubling, does not provide enough of a nexus to give him standing to sue here. As such, defendant's motion to dismiss Greg Smith's claims under 42 U.S.C. § 1983 must be dismissed.

b. State Law Claims

Greg Smith also raises claims under state law. (*See* Doc. No. 1 ¶46.) Specifically, Greg Smith alleges that defendant's discharge of Mary Lou Smith, Greg Smith's mother, following his announcement of his candidacy for Mineral County Circuit Clerk violated his rights under West Virginia public policy and the West Virginia Constitution. These state law claims are only before the court pursuant to 28 U.S.C. § 1367, which grants this court supplemental jurisdiction over "all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" as the other claims that grant the court jurisdiction under Article III of the United States Constitution.

Although a court that has dismissed federal claims has the ability to retain jurisdiction over closely related state law claims, the court has the discretion to decline to exercise supplemental jurisdiction over claims outside its original jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Shanaghan v. Cahill,* 58 F.3d 106, 110 (4th Cir. 1995) (stating that district courts "enjoy wide latitude in determining whether or not to retain jurisdiction over state law claims when all federal law claims have been extinguished."). To determine whether to retain jurisdiction over state law claims, the court should consider "convenience and fairness to the parties, the existence of any

underlying issues of federal policy, comity, and considerations of judicial economy." *Semple v. City of Moundsville*, 195 F.3d 708, 714 (4th Cir. 1999).

Although the court finds the allegations contained in the Complaint regarding defendant's actions toward Greg Smith extremely troubling, the court declines to continue jurisdiction over Greg Smith's claims arising under state law. As such, the court orders these claims dismissed without prejudice.

2. Defendant's Motion to Dismiss regarding Mary Lou Smith

a. Claim under 42 U.S.C. § 1983

The court moves to defendant's motion to dismiss regarding Mary Lou Smith. In his motion, defendant contends that plaintiff Mary Lou Smith's claims are barred by the doctrine of qualified immunity, that her claims fail to state a claim for wrongful discharge or retaliation based upon the violation of a substantial public policy, and that her claims are barred under principles of claim preclusion as they were already addressed by the West Virginia Supreme Court of Appeals. (*See* Doc. No. 7 at 9-15, 19-21.)

Having examined these arguments and applicable case law, the court grants defendant's motion to dismiss as to Mary Lou Smith because defendant has failed to plead a claim upon which relief can be granted. Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate in such situations. *See Flood v. New Hanover County,* 125 F.3d 249, 252 (4th Cir. 1987). Federal courts have limited jurisdiction, possessing only the powers authorized by the United States Constitution and prescribed under statute. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Here, plaintiff avers that her rights under the First and Fourteenth Amendments of the United States Constitution

were violated when defendant terminated her because her son chose to run for public office. (*See* Doc. No. 1 ¶45.) However, plaintiff does not allege that she took any action to support her son's candidacy, or that she exercised rights granted to her under the United States Constitution whatsoever. Her failure to allege that she exercised a constitutionally protected right is fatal to the claim she attempts to allege.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); see also *Garcetti v. Ceballos,* 126 S. Ct. 1951, 164 L. Ed. 2d 689, 2006 U.S. LEXIS 4341, at *7 (U.S. 2006). A public employer contravenes an employee's First Amendment free speech rights when it discharges or "refuses to rehire [the] employee" or when it makes decisions relating to "promotion, transfer, recall, and hiring based on the exercise of" that employee's free speech rights. *Ridpath v. Bd. of Governors Marshall Univ.,* 447 F.3d 292, 2006 U.S. App. LEXIS 11693, at *50-51 (4th Cir. May 11, 2006) (quoting *Suarez Corp. v. McGraw,* 202 F.3d 676, 686 (4th Cir. 2000) (internal quotation marks omitted)). In order to prove that a retaliatory employment action violated a public employee's free speech rights, the employee must satisfy the three-prong test laid out in *McVey v. Stacy,* 157 F.3d 271, 277-78 (4th Cir. 1998). Under *McVey,* first, the employee must speak out as a citizen, not as an employee, on a matter of public concern. *Id.* at 277. Second, the employee's interest in the expression at issue must have outweighed the employer's "interest in providing effective and efficient services to the public." *Id.* Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action. *Id.* at 277-78 n.26.

Here, there are no allegations that Mary Lou Smith ever said or did anything in support of her son's candidacy.[5] The Complaint alleges that defendant's actions were not to chill Mary Lou Smith's rights, but instead to chill the rights of her son. All of the case law surrounding retaliation claims under the First Amendment to the United States Constitution focuses on situations where an employee has already spoken out and exercised her constitutional rights, there is little guidance for situations where, as here, the retaliation happens before any statements, or associational conduct, ever happened. See *Ridpath*, 2006 U.S. App. LEXIS 11693, at *63 (listing cases where an employee was fired after having made statements that their employer disagreed with).

In her brief, plaintiff contends that an employer's perception that an employee has engaged in protective speech is enough to

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[5] Although the concern is entirely theoretical, it is also clear that plaintiff has no apparent, valid claim under the Equal Protection Clause. The Equal Protection Clause provides that "no State shall . . . deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. It is clear that a "pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause." *See Edwards v. City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999) (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997)). Plaintiff's claim here is such a generic retaliation claim. The only plausible claim that plaintiff may have is that she is a member of a "class of one" who has been intentionally treated differently than other similarly situated persons, and that there is no rational basis for the difference in treatment. *See, e.g., Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446, 43 S. Ct. 190, 67 L. Ed. 340 (1923). However, plaintiff pleaded no such claim, and it would likely fail when confronted with plaintiff's status as an at will employee

present a First Amendment retaliation claim.[6] (*See* Doc. No. 9 at 11 n.7.) Plaintiff notes that:

> In other contexts courts have rejected similar defenses recognizing that the defendant's perception that plaintiff has engaged in protected activity is sufficient to state a cause of action. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 565 (3d Cir. 2002) ("We also believe that [plaintiff's] perception theory of illegal retaliation - that he was fired because Mercy thought that he was engaged in protected activity, even if he actually was not - presents a valid legal claim. Because the statutes forbid an employer's taking action against an employee for discriminatory reasons," it does not matter that the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable."); *Grosso v. City Univ.*, 2005 U.S. Dist. LEXIS 4089, at *9 (S.D.N.Y. Mar. 14, 2005) ("Defendants provide no authority that holds the perception theory of retaliation is invalid. Moreover, we find that the language of 42 U.S.C. § 2000e-3(a) is consistent with the 'perception theory' of retaliatory discrimination. Thus, we believe plaintiff states a valid claim for retaliatory discrimination based on culpable behavior before plaintiff engaged in protected activity to the extent

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[6] Plaintiff refers to this as "defendant's mistake of fact defense." As will be discussed herein, it is not defendant's defense, but that plaintiff has pleaded essentially a "preemptive retaliation" claim.

> that the behavior was motivated by their belief that plaintiff had already done so.").

(*Id.*)

As plaintiff notes, neither *Fogelman* nor *Grosso* are First Amendment retaliation cases. They are both premised on the language of particular statutes, neither of which is 42 U.S.C. § 1983, the statutory basis here. In *Fogelman*, after a father filed a separate action alleging that he was forced out of his job due to age and disability discrimination, a son, who worked for the same employer, raised claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the Pennsylvania Human Rights Act, 43 Pa. Cons. Stat. §§ 951-963, alleging that he had been fired in retaliation for the action filed by his father. *See* 283 F.3d at 564. To reach its eventual conclusion, the Third Circuit construed the language of the three statutes plaintiff sued under, and found that certain language in the ADA permitted plaintiff to file suit. *See id.* at 564, 570-71.[7] However, the court found that, because of the phrasing of the other statutes plaintiff attempted to sue under,

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[7] The relevant portion of the ADA, 42 U.S.C. § 12203(b), provides that

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected under this chapter.

The Third Circuit specifically noted that it was construing this section in reaching its eventual conclusion that plaintiff's suit under the ADA was permitted. *See* 283 F.3d at 561.

his causes of action under them must be dismissed. *Id.* at 565-70.

Grosso also focuses on particular statutory language, specifically 42 U.S.C. § 2000e-3(a). In Grosso, plaintiff alleged that he was subjected to a hostile work environment for assisting plaintiffs Drs. Gloria L. Salerno and Emelise Aleandri in a Title VII action. *See* 2005 U.S. Dist. LEXIS 4089, at *5-6. Plaintiff's theory was that defendants subjected him to a hostile work environment because they believed he had engaged in a protected action - even before he had actually done so. *Id.* 2005 U.S. Dist. LEXIS 4089, at *6. In resolving defendant's motion to dismiss, the court examined *Fogelman* and the language of 42 U.S.C. § 2000e-3(a).[8] *See id.* 2005 U.S. Dist. LEXIS 4089, at *9-10.

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[8] It appears that the Grosso court actually misapplied Fogelman as it states that Fogelman approved the involved plaintiff's claims under both the ADA and the ADEA. See *Grosso, 2005 U.S. Dist. LEXIS at *8-10* (discussing *Fogelman, 283 F.3d at 561, 571)*. As noted above, in Fogelman, the Third Circuit only allowed one ADA claim to continue. The Grosso court also relies on the bald assertion that *42 U.S.C. § 2000e-3* is consistent with a "perception theory" of retaliatory discrimination, without providing any indication of where in that statute that theory has its basis. See *id. at *9*.

Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993), provides a more reasoned analysis of "preemptive retaliation" under *42 U.S.C. § 2000e-3*. The Sauer court makes it clear, as did Fogelman, that "preemptive retaliation" claims must have a statutory basis. *Id.* (stating that "[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact; consequently, we hold that this form of pre-emptive retaliation falls within the scope of *42 U.S.C. 2000e-3*.").

Plaintiff's claim here sounds under 42 U.S.C. § 1983, alleging violations of her rights under the First and Fourteenth Amendments to the United States Constitution. (*See* Doc. No. 1 ¶45.) The court is aware of no authority supporting the proposition that a party can show a violation of her First or Fourteenth Amendment rights, actionable under 42 U.S.C. § 1983, without the party having engaged in some activity protected under the United States Constitution. In relevant part, Section 1983 provides that:

> Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

The language contained in this statute is far narrower than the language contained in statutes such as 42 U.S.C. § 12203(b) or 42 U.S.C. § 2000e-3 which have been used to allow claims based on "preemptive retaliation. " That Mary Lou Smith never exercised any constitutionally guaranteed right prior to the termination of her employment is fatal to her claim given the language of 42 U.S.C. § 1983.[9] The conduct alleged in the

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[9] Indeed, even if the language of 42 U.S.C. § 1983 were identical to 42 U.S.C. § 12203(b) or 42 U.S.C. § 2000e-3, her pleadings would not sound a claim. Under Section 12203(b), plaintiff would have had to plead that she "aided or encouraged" her son to exercise his rights. *See id.* Similarly, Section 2000e-3 would require her to take some action such as making a charge, or even assisting, a party to show a violation. *See* 42 U.S.C. § 2000e-3(a);

Complaint does not sound a federal claim as to plaintiff Mary Lou Smith because being a family member of someone who runs for office does not appear to be protected under the United States Constitution, and this is all she pleaded.[10] As such, defendant's motion to dismiss Mary Lou Smith's claims under 42 U.S.C. § 1983 must be granted.

b. Claims under State Law

In her Complaint, plaintiff Mary Lou Smith also states claims sounding under the laws of the State of West Virginia. (*See* Doc. No. 1 ¶45) (stating, in part, that defendant's actions violated plaintiff's rights under Article III §§ 1,7, and 16 of the West Virginia Constitution). These state law claims are only before the court pursuant to 28 U.S.C. § 1367, which grants this court supplemental jurisdiction over "all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" as the other

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Jennings v. Tinley Park Cmty. Consol. Sch. Dist., 796 F.2d 962, 966-67 (7th Cir. 1986) (stating that the first element in a prima facie case of retaliatory discrimination a plaintiff must show is that they engaged in a statutorily protected form of expression).

[10] All of the retaliation cases under Section 1983 of which this court is aware require a plaintiff to show that they engaged in some form of protected activity before having a valid claim. *See. e.g.*, *Elrod v. Burns*, 427 U.S. 347, 350, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (finding that membership, or nonmembership in a political party was an activity protected by the First Amendment); *Rutan v. Republican Party*, 497 U.S. 62, 64-65, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990); *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 202) (supporting another candidate implicated First Amendment Rights); *Sales v. Grant*, 158 F.3d 768, 779 (4th Cir. 1998) (same). There appears to be no authority that support of a political candidate may be inferred from a familial relationship with said candidate.

claims that grant the court jurisdiction under Article III of the United States Constitution.

As the court noted above regarding Greg Smith, it has discretion to accept or reject the remaining claims against defendant alleged by Mary Lou Smith. These questions remaining include difficult issues of state law that are better handled by state courts. Indeed, this dispute has already once been before the West Virginia Supreme Court of Appeals, if in an administrative, and not a judicial capacity. The court believes that Mary Lou Smith's claims under public policies of the State of West Virginia and the West Virginia Constitution are better handled by the courts of the State of West Virginia. Although it is moderately troubling to this court that any state judge who hears this dispute will likely have a relationship with defendant, any judge whose relationship with defendant would cause an appearance of impropriety would recuse themselves. This provides no reason for this court to keep jurisdiction over the state claims averred in the Complaint. As such, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise jurisdiction over these claims, and such claims are hereby dismissed without prejudice.

D. Conclusion

For the reasons outlined above, defendant's motion to dismiss (Doc. No. 7) is hereby granted.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is SO ORDERED this 14th day of June, 2006.

David A. Faber

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARY LOU SMITH and,
GREG SMITH,

Plaintiffs,

v. CIVIL ACTION NO. _____

ANDREW N. FRYE, JR.,
Defendant.

COMPLAINT

Introduction

1. Mary Lou Smith and Greg Smith bring this case against Andrew N. Frye, Jr., Judge of the 21st Circuit of West Virginia, alleging violations of their rights under state and federal law. The case arises out of the decision of Andrew N. Frye, then Chief Judge of the 21st Circuit, to fire Mary Lou Smith from her position as Magistrate Court Clerk of Mineral County solely because her son, Greg Smith, filed to run for office in the primary election against the incumbent Circuit Clerk of Mineral County.

Jurisdiction

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343 and has supplemental jurisdiction over this matter pursuant to 28 U.S.C. § 1367.

Venue

3. Venue lies in the Northern District of West Virginia pursuant to 28 U.S.C. § 1391.

Parties

4. Mary Lou Smith is, and has been at all times relevant herein, a resident of Mineral County, West Virginia.

5. Greg Smith is, and has been at all times relevant herein, a resident of Mineral County, West Virginia, and is the adult son of Mary Lou Smith.

6. Judge Frye is, and has been at all times relevant herein, a resident of Grant County, West Virginia.

Facts

7. Mary Lou Smith was hired as Clerk of the Magistrate Court of Mineral County, West Virginia in November 2002.

8. In her position as Magistrate Court Clerk, Ms. Smith was under the supervision of the Chief Judge of the 21st Judicial Circuit of West Virginia.

9. Andrew N. Frye, Jr., was the Chief Judge of the 21st Judicial Circuit of West Virginia in 2004.

10. On January 30, 2004, Ms. Smith's oldest son, Greg Smith, then age 30, filed to run for the position of Circuit Clerk in the upcoming Republican Party primary against the incumbent Circuit Clerk of Mineral County.

11. The Circuit Clerk does not have any supervisory or other direct employment relationship with the Magistrate Clerk.

12. On January 30, 2004, shortly after learning that Greg Smith had filed to run for circuit clerk, the defendant, Judge Frye, told Judge Philip B. Jordan, Jr., the other judge of

the 21st Judicial Circuit, that he wanted to fire Ms. Smith because her son had filed to run for circuit clerk.

13. At the time that the defendant told Judge Jordan of his intent to fire Ms. Smith, the defendant, according to Judge Jordan, was angry at Ms. Smith because of her son's candidacy for the position of circuit clerk.

14. Prior to this date, the defendant had never told Ms. Smith or anyone else that he had any concerns about her or her work.

15. Prior to this date, no complaints had been made by anyone about Ms. Smith's performance as the Magistrate Clerk; to the contrary, she was widely respected by everyone with whom she worked.

16. Judge Jordan tried to dissuade the defendant from firing Ms. Smith, advising the defendant that he, Judge Jordan, did not think it was the right thing to do.

17. On February 5, 2004, the defendant terminated Ms. Smith's employment in a letter he hand-delivered to Ms. Smith at her desk in the offices of the Magistrate Court.

18. The defendant fired Ms. Smith because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk.

19. Subsequent to the firing, Ms. Smith requested a hearing under the personnel policies of the West Virginia Supreme Court of Appeals ("Supreme Court").

20. The personnel policies of the Supreme Court include an administrative appeal procedure for judicial employees.

21. This appeal procedure is provided by the Supreme Court in the Court's capacity as an employer; the appeal procedures are not judicial proceedings.

22. Under the Supreme Court's personnel procedures, Ms. Smith was entitled to a hearing before a

hearing officer who would make recommendations to the Administrative Director of the Supreme Court or to his designee.

23. Prior to her hearing, Ms. Smith objected to the constitutionality of the proceeding and, in particular, to the fact that the Judge who was appointed to conduct the hearing denied Ms. Smith's request to require the defendant to disclose his reason for firing Ms. Smith prior to the hearing.

24. At the administrative hearing, Judge Jordan, who was called as a witness by Ms. Smith, testified that the defendant said that he was going to fire Ms. Smith because her son had filed to run in the primary election against the incumbent Circuit Clerk.

25. The defendant did not disagree with Judge Jordan's testimony about what he, the defendant, had said. Instead, the defendant testified that he did not recall the details of his conversations with Judge Jordan.

26. When the defendant was asked why he fired Ms. Smith, he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her.

27. The defendant claimed that he had been planning to fire Ms. Smith prior to learning of her son's decision to run for circuit clerk and that he had, in fact, requested a model termination letter from the Administrative Office of the Supreme Court approximately three to four weeks before the date, February 5, 2004, that he terminated Ms. Smith's employment.

28. However, James Albert, the Interim Director of the Administrative Office, contradicted the defendant's testimony. Mr. Albert testified that, according to his own records, the defendant spoke to him about firing Ms. Smith on February 4, 2004, *i.e.*, five days after Greg Smith filed his candidacy papers and one day before Ms. Smith was

terminated, not, as the defendant claimed, three to four weeks before Ms. Smith was terminated from her employment.

29. Subsequent to the hearing, the hearing officer, a senior status judge, concluded that Ms Smith "would not have been discharged from her judicial employment on February 5, 2004, if her son had not become a candidate for circuit clerk, but that such discharge did not violate state or federal law."

30. The hearing officer was incorrect, as a matter of law, in concluding that the discharge of Ms. Smith because her son filed to run for the position of circuit clerk did not violate state or federal law.

31. Under the personnel policies of the West Virginia Supreme Court of Appeals, the decision on Ms. Smith's administrative appeal is made by the Administrative Director of the Court or his designee who must decide whether to affirm or reverse the recommendation of the hearing officer.

32. In Ms. Smith's case, the decision was made by a designee of the Interim Administrative Director.

33. The designee of the Interim Administrative Director denied Ms. Smith's request to submit a legal memorandum to demonstrate why the hearing examiner's recommendation was incorrect as a matter of law.

34. Although the termination of Ms. Smith because of her son's candidacy is contrary to state and federal law, the hearing examiner's recommendation was adopted by the designee of the Administrative Director of the Supreme Court.

35. Although Ms. Smith requested an "administrative review" of the decision by the Supreme Court, pursuant to the Supreme Court's internal personnel policies, the Supreme Court denied Ms. Smith's petition for administrative review.

36. Under the Supreme Court's personnel policies, the Court's denial of review was "an administrative action."

37. The decision upholding the termination of Ms. Smith was contrary to law and the fact finding, in part, was arbitrary, capricious, grossly erroneous and not supported by substantial evidence insofar as it purported to find reasons for the defendant's decision to fire Ms. Smith when the defendant, in fact, testified that he had had no reason for firing her.

38. The hearing and other proceedings in which Ms. Smith participated were not judicial proceedings and, therefore, there has never been a full and final adjudication of the facts and of the law applicable to Ms. Smith's termination from employment; nor did Ms. Smith have any further appeal from the internal administrative review of her termination after the Supreme Court chose not to review the decision of the Administrative Director.

39. The internal appeal procedures under the Supreme Court's personnel policies are designed to be simple and expeditions, do not permit discovery, and do not provide the full panoply of rights available under a judicial proceeding.

40. In terminating the employment of Ms. Smith, the defendant was acting under color of law in his administrative, not judicial, capacity.

41. As a direct and proximate result of the firing of Mary Lou Smith, the rights of Greg Smith and others similarly situated have been chilled because it appears that, in West Virginia, a person can be fired from her position in state government solely because her supervisor believes that she supports a relative who is running for political office.

42. As a direct and proximate result of the unlawful termination of Ms. Smith from her employment as Magistrate Clerk, Ms. Smith has lost and will continue to lose wages and benefits in an amount to be determined by the jury.

43. As a direct and proximate result of the unlawful termination of Ms. Smith from her employment as Magistrate Clerk, Ms. Smith suffered indignity, embarrassment,

humiliation and emotional distress entitling her to damages in an amount to be determined by the jury.

44. As a direct and proximate result of the unlawful retaliation against Greg Smith, Greg Smith has suffered indignity, embarrassment, humiliation and emotional distress entitling him to damages in an amount to be determined by the jury.

Causes of Action

45. By terminating Ms. Smith's employment because her son chose to run for public office, the defendant violated Ms. Smith's rights under the First and Fourteenth Amendments to the United States Constitution, under 42 U.S.C. § 1983, under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under the Public Policy of the State of West Virginia.

46. By terminating Ms. Smith's employment in retaliation against Greg Smith because he, Greg Smith, chose to run against the incumbent circuit clerk, the defendant violated the rights of Greg Smith under the First and Fourteenth Amendments to the United States Constitution, under 42 U.S.C. § 1983, under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under the Public Policy of the State of West Virginia.

Punitive Damages

47. The termination of Ms. Smith from her employment as Magistrate Clerk because her son, Greg Smith, filed to run for the office of Circuit Clerk was willful, wanton, malicious and undertaken in reckless disregard for the rights of Mary Lou Smith, Greg Smith and others similarly situated entitling Mary Lou Smith and Greg Smith to exemplary or punitive damages in an amount to be determined by the jury.

WHEREFORE, Mary Lou Smith and Greg Smith request relief as follows:

1. Damages for Mary Lou Smith and Greg Smith as set forth above;
2. Exemplary damages against the defendant in an amount to be determined by the jury;
3. Reasonable attorney fees and costs; and
4. Such other relief as may be just and equitable.

Jury Trial Demanded

Plaintiffs demand a jury trial on all issues triable to a jury.

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